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RESTAURANT CORPORATION

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

17 MARC SMITH; KEN WHELAN;
18 individually and on behalf of members of the
general public similarly situated, and as
19 aggrieved employees pursuant to the Private
Attorneys General Act (“PAGA”),

20 Plaintiffs,

21 v.

22 BRINKER INTERNATIONAL, INC., a
Delaware corporation; BRINKER
23 RESTAURANT CORPORATION, a
Delaware corporation; and DOES 1 through
24 100, inclusive,

25 Defendants.

Case No. C 10 0213 VRW

**DEFENDANTS' REPLY
MEMORANDUM IN
SUPPORT OF MOTION TO
DISMISS**

Date: May 6, 2010
Time: 10:00 a.m.
Judge: Hon. Vaughn R. Walker
Courtroom: 6

1 **I. INTRODUCTION**

2 As set forth in detail in Defendants' Opening Memorandum, Plaintiffs' First
3 Amended Complaint fails to meet the pleading standard set forth by the Supreme
4 Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) because it is entirely lacking in
5 factual averments and is comprised entirely of conclusory averments that merely
6 parrot the causes of action and their elements. Plaintiffs' opposition fails to
7 establish otherwise. In fact, Plaintiffs' opposition – in particular the July 17, 2009
8 Order in *DeLeon v. Time Warner Cable LLC* (the “*DeLeon Order*”) of which
9 Plaintiffs ask the Court take judicial notice – supports dismissal of the First
10 Amended Complaint, not the opposite.

11 The *DeLeon Order* (which Defendants cited in their Opening Memorandum)
12 supports dismissal of Plaintiffs' First Amended Complaint because it reflects that
13 the *DeLeon* court not only granted a motion to dismiss a complaint that was
14 virtually identical to the First Amended Complaint in this case, but also that the
15 *DeLeon* court outright rejected the exact same legal arguments Plaintiffs assert in
16 their opposition brief here. Indeed, a comparison of Plaintiffs' opposition in this
17 case to the plaintiff's opposition to the defendant's motion to dismiss in *DeLeon*
18 reveals that Plaintiffs' counsel (who were also counsel for the plaintiff in *DeLeon*)
19 merely re-filed their *DeLeon* brief in this case after making a few inconsequential
20 alterations. (See Plaintiff Saul DeLeon's Opposition to Motion to Dismiss, attached
21 as Ex. A to Defendants' Request for Judicial Notice filed concurrently herewith.)
22 Plaintiffs' reassertion of the same arguments that were rejected by the court in
23 *DeLeon* is fatal to their opposition and mandates dismissal of the First Amended
24 Complaint. It also amounts to rank bad faith.

25 For the reasons set forth in Defendants' Opening Memorandum and below,
26 the First Amended Complaint fails to state a claim and should be dismissed.

1 **II. ARGUMENT**

2 Plaintiffs make three arguments to avoid the dismissal of the First Amended
 3 Complaint. None of them is availing, as shown below.

4 **A. Plaintiffs Rely on Case Law that Has No Current Force.**

5 Plaintiffs first argue that they have sufficiently stated their claims
 6 based solely on cases – no less than 15 – that pre-dated the Supreme Court’s
 7 decision in *Iqbal*, 129 S. Ct. 1937. (Opp. at 2:11-4:17.) But in holding in *Iqbal* that
 8 to satisfy Rule 8(a)(2) and survive a motion to dismiss under Rule 12(b)(6), a
 9 complaint must aver actual facts – not mere legal conclusions masquerading as
 10 facts – demonstrating a plausible claim for relief (*Iqbal*, 129 S. Ct. at 1949-50), the
 11 Supreme Court fundamentally altered the standard of pleading that Plaintiffs were
 12 require to meet. Under *Iqbal*, a complaint “that offers ‘labels and conclusions’ or ‘a
 13 formulaic recitation of the elements of a cause of action will not do. Nor does a
 14 complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
 15 enhancement.’” (Internal citations omitted.) *See id.* at 1949-50 (“Threadbare
 16 recitals of the elements of a cause of action, supported by mere conclusory
 17 statements, do not suffice.”).

18 Simply put, Plaintiffs cannot rely on outdated authorities for a standard of
 19 pleading that has been superseded by *Iqbal* to avoid dismissal of the First Amended
 20 Complaint. Nor do their other arguments save them.

21 **B. Plaintiffs Erroneously Argue that *Iqbal* Does Not Apply Here.**

22 Plaintiffs next argue that the standard set forth by the Supreme Court in
 23 *Iqbal* does not apply to this case. (Opp. at 6:15-7:10.) Incredibly, Plaintiffs make
 24 this argument without citation to any authority and despite the fact that both *Iqbal*
 25 and the *DeLeon* Order they submitted with their opposition hold directly to the
 26 contrary. *Iqbal*, 129 S. Ct. at 1953 (pleading standard applies to “all civil actions”);
 27 *DeLeon* Order at 2 (“Plaintiff argues that this Court should not apply the
 28 ‘heightened standard’ set forth in *Iqbal*. . . . The Court disagrees.”) In fact,

1 Plaintiffs' counsel made the exact same arguments in *DeLeon* regarding the
 2 inapplicability of *Iqbal* that they are now making here, and the *DeLeon* court
 3 outright rejected those arguments. (See *DeLeon* Order at 2 and Opp. to Mot. to
 4 Dismiss at 5:10-7:2, Ex. A to Dfts' RJN.) There is no justification for Plaintiffs'
 5 continued assertion of an argument in this case that they know to be without merit.
 6 See Fed. R. Civ. Proc. 11.

7 As demonstrated by the *DeLeon* Order, as well as the other cases cited in
 8 Defendants' Opening Memorandum, which Plaintiffs wholly neglect to address, the
 9 *Iqbal* standard applies to all civil cases, including putative wage and hour class
 10 actions such as this one. (*DeLeon* Order at 3 ("The *Iqbal* standard...applies to all
 11 civil cases.")); *see also, Harding v. Time Warner, Inc.*, No. 09cv1212-WQH-WMC,
 12 2009 U.S. Dist. LEXIS 72851, at *8-9 (S.D. Cal. Aug. 18, 2009) (applying *Iqbal*
 13 standard to grant motion to dismiss wage claims); *Field v. Am. Mortgage Express,*
 14 *Corp.*, No. C 09-01430 MHP, 2009 U.S. Dist. LEXIS 100063 (N.D. Cal. Oct. 27,
 15 2009) (same). Plaintiffs' bad faith attempt to argue to the contrary should be
 16 rejected.

17 **C. Plaintiffs Alternatively – and Equally Erroneously – Argue that
 18 the First Amended Complaint Is Sufficiently Pledged Under *Iqbal*.**

19 After making an unavailing effort to argue that *Iqbal* does not apply in
 20 this case, Plaintiffs take the fall-back position that even if it does apply, the First
 21 Amended Complaint is sufficient to satisfy the *Iqbal* standard. (Opp. at 7:11-8:4.)
 22 However, Plaintiffs' list of the "factual averments" allegedly contained in the First
 23 Amended Complaint is entirely devoid of facts and instead constitutes no more than
 24 a laundry-list of the elements of the various causes of action. (Opp. at 4:24-6:8.) In
 25 fact, three of the paragraphs quoted by Plaintiffs in their opposition are virtually
 26 identical to the three paragraphs quoted by the *DeLeon* Court to demonstrate the
 27 inadequacy of the averments in that action. (*DeLeon* Order at 4-5.)

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1 Under the standard set forth in *Iqbal*, Plaintiffs cannot survive a motion to
 2 dismiss with averments that merely “parrot” the statutory language that forms the
 3 basis for the claims. *Iqbal*, 129 S. Ct. at 1949-50 (“Threadbare recitals of the
 4 elements of a cause of action, supported by mere conclusory statements, do not
 5 suffice.”); *DeLeon* Order at 5 (deeming insufficient allegations that “simply parrot[]
 6 the statutory language”); and see *Moss v. United States Secret Serv.*, 572 F.3d 962,
 7 969 (9th Cir. 2009) (“[B]are assertions . . . amount[ing] to nothing more than a
 8 “formulaic recitation of the elements” of a . . . claim’ . . . do nothing more than state
 9 a legal conclusion – even if that conclusion is cast in the form of a factual
 10 allegation.”). The First Amended Complaint – which is entirely lacking in factual
 11 averments – is therefore insufficiently pleaded and should be dismissed.

12 **III. CONCLUSION**

13 Plaintiffs’ First Amended Complaint fails to satisfy the pleading standard set
 14 forth by the Supreme Court in *Iqbal*, and Plaintiffs have not shown otherwise. For
 15 all the reasons set forth above and in their Opening Memorandum, Defendants’
 16 motion to dismiss should be granted.

17 Dated: April 22, 2010

Respectfully submitted,

MORRISON & FOERSTER LLP

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20 By:


Karen J. Kubit

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22 Attorneys for Defendants BRINKER
23 INTERNATIONAL, INC. and BRINKER
24 RESTAURANT CORPORATION

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